IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-317

DUPONT GLORE FORGAN INCORPORATED, *et al.*,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The petitioners in this class action charged the respondents, American Telephone and Telegraph Company ("AT&T") and 23 operating telephone companies of the Bell System (the "operating companies"), with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, and a mandate alleged to be contained in the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965).* After a nonjury trial, the United States District Court for the Southern District of New

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* Petitioners abandoned before the trial herein their claim that respondents had violated Section 2 of the Sherman Act, 15 U.S.C. § 2 (Pet. 8a n.3). Petitioners' tax refund claim was dismissed by the District Court, 428 F. Supp. 1297 (S.D.N.Y. 1977), in a decision which was affirmed by the Court of Appeals (Pet. 2a) and is not challenged by petitioners here (Pet. 11 n.2).

York, Honorable Edward Weinfeld, U.S.D.J., filed an opinion (Pet. 6a-74a) which dismissed petitioners' complaint on the merits. After a comprehensive review of the facts (Pet. 9a-49a), Judge Weinfeld found as a fact that respondents had engaged in no contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act (Pet. 49a-55a), and that even if there had been a contract, combination, or conspiracy, it would not have violated Section 1 of the Sherman Act under either the *per se* doctrine or the rule of reason (Pet. 56a-66a). Judge Weinfeld also held that the Excise Tax Reduction Act of 1965 did not support petitioners' claim (Pet. 67a-74a).

On appeal, the United States Court of Appeals for the Second Circuit (Mulligan, Circuit Judge, Gewin, Senior Circuit Judge, and Miller, Associate Judge, United States Court of Customs and Patent Appeals) affirmed "on the carefully considered opinions of Judge Weinfeld reported at 437 F. Supp. 1104 and 428 F. Supp. 1297" (Pet. 2a).* Petitioners' petitions for rehearing and rehearing en banc were denied (Pet. 3a-5a).

Questions Presented

1. Did the Courts below correctly find that the respondents did not enter into a contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1?

* Petitioners' allegation that Judge Weinfeld's decision was "not given meaningful appellate review below" (Pet. 3; *see also* Pet. 11) is wholly unjustified. Oral argument in the Court of Appeals lasted more than one hour, during which the Court asked numerous questions reflecting a thorough familiarity with the factual and legal issues presented. The fact that the Court of Appeals affirmed on the opinions of Judge Weinfeld is evidence of the excellence of those opinions, and not of any lack of "meaningful appellate review".

2. Did the Courts below correctly find that, even if respondents had been found to have entered into a contract, combination, or conspiracy, their conduct would not have violated Section 1 of the Sherman Act, either under the *per se* doctrine or under the rule of reason?

3. Did the Courts below correctly hold that the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), did not contain any mandate requiring the establishment of separate Centrex station charges for exchange access and for intercommunication?

Statement of the Case

Petitioners' Statement of the Case (Pet. 7-10), and the factual allegations made elsewhere in the Petition, are highly selective and incomplete, omitting most of the key findings of the Courts below and virtually all of the evidence supporting those findings. The purpose of this Statement of the Case is to furnish an accurate summary of the findings of the Courts below and the evidence supporting those findings.

1. The Parties

The petitioners were taxable Centrex customers of one or more of the respondent operating telephone companies during the period relevant to this action (Pet. 9a). The respondents are AT&T and 23 operating telephone companies in which AT&T owns some or all of the capital stock (Pet. 10a-11a).

Each operating company, within its service area, is the only telephone company which is authorized under the applicable state laws to render Centrex service (Pet. 10a). Each operating company is an independently managed

corporation, managed by its own Board of Directors (Pet. 9a). AT&T renders advice and assistance to the operating companies pursuant to License Contracts in effect between AT&T and the operating companies (Pet. 11a). The District Court found that the relationship between AT&T and the operating companies under the License Contracts is one in which operating company personnel seek and receive advice from their coordinates at AT&T, and AT&T employees seek information from their operating company coordinates to assist them in developing recommendations (Pet. 50a-51a).

2. The Introduction of Centrex Service

Centrex service is a form of telephone service which is used by large businesses and other organizations. A business or other organization which has a large number of telephones (or "stations") on its premises may desire a specific service for "intercommunication" among such telephones, as well as for "exchange access" to the general telephone network (Pet. 12a). For many years prior to 1961 the operating companies provided intercommunication and exchange access to such customers by means of Private Branch Exchange ("PBX") service (Pet. 13a). Under the governing tariffs filed with state regulatory authorities, a PBX subscriber generally paid a separate monthly charge for each PBX station, for each PBX trunk, and for each item of PBX switching equipment (*ibid.*). Such PBX rates proved to be cumbersome and complex in operation (Pet. 36a-37a). Moreover, they made it impossible to give a prospective PBX customer a satisfactory estimate of the charges it could expect to pay without making a detailed engineering study of the equipment that would be needed to render PBX service to that customer (Pet. 37a).

In April 1961 AT&T sent to the operating companies recommendations concerning a new service called Centrex service (Pet. 33a). Centrex service, like PBX service, provides the capability of intercommunication among the telephone stations within the subscriber's Centrex system, as well as access to the telephone network (Pet. 15a). Centrex service is characterized by direct inward dialing (the ability to dial each Centrex station directly from telephones outside the Centrex system) and identified outward dialing (the ability to provide individual billing of the message unit and toll calls made by each Centrex station) (Pet. 14a-16a).

AT&T recommended that the operating companies file tariffs establishing a single monthly charge for each Centrex station, without any separate monthly charge for trunks and switching equipment (Pet. 36a). AT&T made this recommendation primarily because a single monthly Centrex station charge was much easier to apply and to explain to customers than the more complex PBX rates (Pet. 36a-37a). Moreover, the use of such a charge minimized the rate differences among different kinds of equipment used to provide Centrex service, thus making it possible to use the most economical equipment in each case and thereby to lower the overall level of Centrex rates (*ibid.*).

The April 1961 AT&T recommendations suggested the desirability of a uniform Centrex rate approach, because it was anticipated that large customers with branch offices scattered across the country would more readily understand Centrex service if similar rate elements were used in the Centrex tariffs in the various locations in which they might wish to subscribe to Centrex service (Pet. 37a). However, AT&T expressly recognized that each operating company

would determine the level of its Centrex rates on the basis of its own anticipated costs and local conditions, and that there would be no uniformity of Centrex rate levels among the operating companies (*ibid.*).

At various times from 1961 to 1968 the operating companies individually filed tariffs covering Centrex service with state regulatory authorities (Pet. 52a). The operating companies made their own decisions as to the type of tariffs they would file, taking into account AT&T's recommendations as well as other relevant factors (*ibid.*). The operating companies did not send their proposed Centrex tariffs to AT&T for review or approval prior to filing (Pet. 52a-53a). On the basis of all the evidence, including the testimony at the trial, the District Court found that no representative of any operating company made any agreement to follow any of AT&T's Centrex rate recommendations, or understood that any other operating company was committed to do so (Pet. 51a-52a).

The initial Centrex tariffs of the operating companies all provided for a single monthly Centrex station charge (Pet. 53a). However, the tariffs departed in many other respects from AT&T's recommendations (*ibid.*). In addition, Centrex rate levels varied widely from state to state (Pet. 59a). On January 1, 1963, the operating companies' rates for the first 50 Centrex stations of a subscriber varied from $6.30 per station to $11.50 per station (Pet. 59a n.84).

Petitioners assert (without record citation) that there was "a tacit agreement by the operating companies—ingrained by habit, renewed by constant communication and enforceable (if ever necessary) by a host of powers—to rely upon and abide by recommendations made by their controlling parent" (Pet. 17). It must be emphasized that this

assertion is no more than counsel's rhetoric, wholly unsupported by the record and contrary to the explicit findings of the District Court. While the District Court found that AT&T's advice was usually followed by the operating companies, with variations to account for local situations (Pet. 11a), it also found that the operating companies made their own decisions as to the types of tariffs they would file (Pet. 52a-53a). As has been shown above, the operating companies often took actions substantially at variance with the recommendations of AT&T.

3. The Regulation of Centrex Service by State Regulatory Authorities

Centrex service is a local telephone service which is regulated by state or local regulatory authorities under state laws (Pet. 10a). These laws require that Centrex rates be set forth in tariffs filed with, and allowed to become effective by, the appropriate state or local regulatory authorities (*ibid.*).

Such state or local regulatory authorities have pervasive regulatory jurisdiction over the rates and practices of telephone companies. *Cf., e.g., Purcell* v. *New York Central R.R.*, 268 N.Y. 164, 171-72, 197 N.E. 182, 184, *appeal dismissed*, 296 U.S. 545 (1935). In exercising their jurisdiction to prescribe just and reasonable charges for telephone service, such authorities may consider all relevant factors, including the Federal communications excise taxes payable on such charges, and the record before the District Court included regulatory decisions in which the effect of such taxes was considered (*see* E1435-E1461*).

* "E" citations are to the Exhibit Volumes in the Court of Appeals.

4. The Federal Excise Tax on Centrex Station Charges

From 1917 to 1924 and from 1932 to date, telephone service and other communications services have been subject to a Federal excise tax (Pet. 17a-18a). During most of the period in suit, the tax was levied at a rate of 10%.

The Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), which repealed a large number of Federal excise taxes, provided that the Federal communications excise tax would be reduced to 3% on January 1, 1966 and would be eliminated by January 1, 1969. 79 Stat. 145 (1965). For the interim period until the Federal communications excise tax was eliminated, the Excise Tax Reduction Act of 1965 enacted Section 4252(d) of the Internal Revenue Code, 79 Stat. 146 (1965), 26 U.S.C. § 4252(d), which exempted "private communication service" from the tax. Section 4252(d) expressly provided that the term "private communication service" "does not include any communication service unless a separate charge is made for such service." The Congressional reports on the Excise Tax Reduction Act stated that until a separate charge was established for Centrex intercommunication service, the "private communication service" exemption of Section 4252(d) would not apply. H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965); S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965).

In 1966, in 1968, and again in 1969, budgetary pressures forced a postponement of the elimination of the Federal communications excise tax, but each time the elimination of the tax was deferred Congress reaffirmed its determination to end the tax (Pet. 21a, 43a-44a & n.62). Finally, the Excise, Estate, and Gift Tax Adjustment Act of 1970, which became law on December 31, 1970, enacted a ten-year program for the gradual repeal of the Federal communications

excise tax at the rate of 1% a year, commencing on January 1, 1973. 84 Stat. 1843 (1970), 26 U.S.C. § 4251(a)(2), (b).

5. Consideration of the Possibility of Establishing Separate Centrex Station Charges

In 1964 and 1965 AT&T employees, including Robert D. Weber, the Exchange Rate Supervisor of AT&T who dealt with Centrex rate and tariff matters, considered the possibility of recommending to the operating companies that they file revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication (Pet. 38a). Several methods of establishing separate charges were considered and found unsatisfactory (*ibid.*). Finally, for reasons discussed in Point 6 of this Statement of the Case, it was decided that AT&T should not recommend the establishment of separate charges (*ibid.*).

In October 1965, after the passage of the Excise Tax Reduction Act of 1965, there were two meetings of personnel from the operating companies to explain to them the changes brought about by the Act (Pet. 38a). As the District Court found (Pet. 54a), these were informational meetings of "implementers", not policy-making conferences. At the meeting, representatives of several operating companies inquired about the possibility of establishing separate Centrex station charges, and were told that AT&T had no plans to recommend that such a separation be made (Pet. 39a). No commitment by any operating company not to establish separate charges was sought or given (Pet. 54a).

During the period of approximately five and one half years from the enactment of the Excise Tax Reduction Act of 1965 until the end of 1970, five Centrex customers made inquiries to operating companies concerning the application

of the Federal excise tax to Centrex station charges (Pet. 39a & n.58). In at least three cases the operating companies consulted with AT&T before responding that no separation would be made (Pet. 39a n.58). Again, as the District Court found (Pet. 54a), no commitment not to establish separate charges was sought by AT&T or given by any operating company.

In March or April 1967 Weber transferred his Centrex rate responsibilities at AT&T to Robert M. Kemp, who likewise considered whether AT&T should recommend the establishment of separate charges (Pet. 39a). For reasons discussed in Point 6 of this Statement of the Case, Kemp decided not to make such a recommendation.

During the period from the enactment of the Excise Tax Reduction Act of 1965 until 1971, the operating companies did not establish separate Centrex station charges (Pet. 54a). Petitioners argue here, as they argued in the Courts below, that this can only be explained as the result of an agreement (Pet. 15, 21-22). On the contrary, as Judge Weinfeld found (Pet. 54a-55a), it was entirely logical for these companies to retain a rate structure which was proving successful, and the fact that they did so gives rise to no inference of conspiracy.

After reviewing all of the foregoing evidence, Judge Weinfeld found that

> "upon the totality of the relevant and probative evidence in the case, including the testimony of those witnesses who testified at the trial, which the Court accepts as credible, the plaintiffs have failed to establish their claim that the defendants entered into any conspiracy relating to Centrex rates." (Pet. 55a.)

6. The Reasons Why AT&T Did Not Recommend the Establishment of Separate Charges Until 1971

Judge Weinfeld made careful findings concerning the reasons why AT&T did not recommend the establishment of separate Centrex station charges until 1971 (Pet. 40a-49a). Since petitioners claimed that Robert M. Kemp and Robert D. Weber of AT&T were "at the heart and soul" of the alleged conspiracy, Judge Weinfeld focused upon the reasons why they did not make such a recommendation earlier (Pet. 40a-44a). Both Kemp and Weber testified at the trial, and Judge Weinfeld expressly stated that his findings were based in part upon "the trial testimony and the forthright demeanor of Kemp and Weber" (Pet. 49a).

The first reason why Kemp and Weber did not make such a recommendation earlier was that the revision of the operating companies' Centrex tariffs to establish separate Centrex station charges was expected to be a difficult, expensive, and time-consuming task, involving detailed studies, preparation and filing of new tariffs, extensive accounting and administrative changes, and retraining of personnel (Pet. 40a-42a). Kemp and Weber concluded that they would not be justified in recommending to the operating companies that they undertake the burden of establishing separate charges for the sake of a tax saving that would shortly be achieved in any event (Pet. 43a-44a).

Second, Kemp and Weber believed that the Centrex "package rate" structure was a good one which had been well received by customers and regulatory commissions, and they were reluctant to recommend any change in the "package rate" structure (Pet. 42a).

Third, Kemp and Weber were concerned whether any method chosen to establish separate charges would be acceptable to the Internal Revenue Service (Pet. 42a).

Fourth, the District Court found that "Kemp and Weber were concerned about the possibility of an expensive, time-consuming challenge before a regulatory commission if new rates were filed" (Pet. 42a). The District Court also found that "[w]hile these officials did not consider that any attack on Centrex rates would be justified or have merit, nevertheless the expense of litigating such a challenge could greatly increase the costs of making the change, and the ultimate outcome was uncertain" (Pet. 43a).

Finally, Judge Weinfeld found that Kemp and Weber believed that the Federal communications excise tax would expire within a few years (Pet. 43a). Judge Weinfeld further found that in light of the history of Congressional action with respect to the communications excise tax, "this belief was not wholly unreasonable" (*ibid.*).

Petitioners assert that the principal reason for AT&T's failure to recommend the establishment of separate Centrex station charges at an earlier date was a fear of the outcome of state rate proceedings involving Centrex rates (Pet. 19). Petitioners fail to mention that although they made the same assertion at the trial, it was flatly rejected by Judge Weinfeld. After a thorough review of the evidence on this issue (Pet. 45a-49a), Judge Weinfeld found:

> "In sum, based upon the totality of the evidence, including the trial testimony and the forthright demeanor of Kemp and Weber, the Court rejects plaintiffs' contention that the defendants' failure to file separate charges for exchange access and intercommunication after 1965 was motivated by a desire to shield Centrex rates from regulatory scrutiny." (Pet. 49a.)

In addition, Judge Weinfeld found that there was no basis for any concern that Centrex rates might be vulnerable to regulatory scrutiny (Pet. 45a-49a).

7. The Establishment of Separate Centrex Station Charges

On December 31, 1970 the Excise, Estate, and Gift Tax Adjustment Act of 1970 enacted a ten-year program for the gradual elimination of the Federal communications excise tax at a rate of 1% a year commencing on January 1, 1973, thus establishing that the Federal communications excise tax would continue to be in effect for a substantial period of time (*see* pp. 8-9 *supra*). On September 27, 1971 AT&T sent to the operating companies a letter recommending that separate charges be established and outlining a proposed method for determining the separate charges (Pet. 39a-40a).

As the District Court found (Pet. 44a-45a), two changes prompted AT&T's recommendation. The first change was the ten-year extension of the Federal communications excise tax, which removed one of the major reasons why a separation had not previously been recommended (*ibid.*). The second change was the offering by non-telephone company suppliers of equipment which competed more directly with Centrex service (Pet. 45a).

Even before AT&T recommended the filing of revised tariffs establishing separate Centrex station charges, several operating companies had individually concluded that such revised tariffs should be filed, and had begun to prepare such revised tariffs (Pet. 54a). During 1971 and 1972 the operating companies filed revised tariffs establishing separate Centrex station charges (Pet. 40a). Some of the operating companies followed the method of separation recommended by AT&T, while other operating companies decided to use different methods (*ibid.*).

Reasons for Denying the Writ

In their petition for certiorari, petitioners request that this Court review and reevaluate the extensive testimonial and documentary evidence presented to the trial court. As shown by the foregoing Statement of the Case and the opinion of the District Court, the evidence more than supported the factual findings made by the District Court. Petitioners do not even attempt to argue in this Court, as they did in the Court of Appeals, that the findings of the District Court were clearly erroneous. Rather, petitioners request yet another review of the record to determine whether the District Court "should have found a conspiracy" (Pet. 15) and should have found an unreasonable restraint of trade. Petitioners have not presented (and could not present) any issue of law calling for review by this Court.

I

The Courts Below Correctly Found That There Was No Contract, Combination, or Conspiracy Among the Respondents.

Petitioners attack the District Court's finding, affirmed by the Court of Appeals, that there was no contract, combination, or conspiracy among the respondents within the meaning of Section 1 of the Sherman Act (Pet. 12-17). Petitioners open with a highly selective and one-sided factual argument for the existence of a contract, combination, or conspiracy (Pet. 12-15). In making this factual argument, petitioners simply refuse to acknowledge the findings of fact made by the District Court.

The issue of a contract, combination, or conspiracy was, of course, hotly contested at the trial. On this issue, respon-

dents presented the testimony of live witnesses, particularly Robert M. Kemp and Robert D. Weber of AT&T, who were claimed by petitioners to be "at the heart and soul" of the alleged conspiracy (Pet. 40a). Judge Weinfeld expressly found that Kemp and Weber testified credibly and with "forthright demeanor" (Pet. 43a, 49a). Under these circumstances, Judge Weinfeld's factual findings are entitled to great weight, because "in an antitrust case with a vast record where much depends upon the motive and intent of the defendants, the credibility of their live witnesses below is particularly significant." *International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 241 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The findings of fact made by Judge Weinfeld amply support his conclusion that there was no contract, combination, or conspiracy among the respondents. Judge Weinfeld found that the contacts between AT&T and the operating companies "were in the nature of an exchange of information and advice, not of solicitation and acceptance of concerted action" (Pet. 51a). He found that no operating company agreed to follow any of AT&T's Centrex rate recommendations, or understood that any other operating company was committed to doing so (Pet. 51a-52a), and that no commitment not to establish separate Centrex station charges was ever sought by AT&T or given by any operating company (Pet. 54a).

Moreover, the proof showed that the operating companies acted independently. Judge Weinfeld found that the operating companies did not send their proposed Centrex tariffs

to AT&T for review or approval prior to filing, and that the tariffs varied in many respects from AT&T's recommendations (Pet. 52a-53a). Judge Weinfeld also found that the operating companies exercised independent judgment in connection with the establishment of separate Centrex station charges in 1971 and 1972, and that some operating companies rejected the method of separation recommended by AT&T (Pet. 54a). Finally, Judge Weinfeld found that it was not against the individual interests of each operating company to maintain a "package rate" for Centrex, and that there were legitimate business reasons for doing so (Pet. 54a-55a).

All of the foregoing facts amply support the finding of the Courts below that there was no contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act. *Cf., e.g., First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 287 (1968); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). Petitioners' attempt to overturn the careful factual findings of the District Court on this issue is wholly without merit.

Going to the legal standard applied by the Court, petitioners strive to make it appear that Judge Weinfeld applied an incorrect legal standard for the determination of the issue of a contract, combination, or conspiracy under Section 1 of the Sherman Act (Pet. 15-17). In fact, Judge Weinfeld's opinion makes it clear that he applied the correct legal standard.

For example, petitioners argue that Judge Weinfeld required proof of an express agreement or express coercion (Pet. 17). In actuality, Judge Weinfeld expressly held that "a finding of actual explicit agreement is not necessary" (Pet. 23a).

Again, petitioners argue that Judge Weinfeld's decision "strips this Court's 'intra-corporate conspiracy' doctrine of all substance" (Pet. 15; footnote omitted). Of course, Judge Weinfeld's decision does no such thing. Judge Weinfeld expressly stated that affiliated corporations are capable of conspiring under Section 1 of the Sherman Act (Pet. 29a-31a). However, Judge Weinfeld found that, on the facts, no such conspiracy occurred in the present case.

Petitioners argue that there was an agreement among the operating companies to follow AT&T's recommendations, and that this agreement was a combination within the meaning of Section 1 of the Sherman Act under *United States* v. *Masonite Corp.*, 316 U.S. 265, 276 (1942) (Pet. 16-17). This argument is flatly contrary to the findings of Judge Weinfeld, who found that the operating companies exercised their own independent judgment and that there was no agreement to follow AT&T's recommendations (Pet. 51a-54a; *see* pp. 6-7, 9-10 *supra*).

Finally, petitioners argue (without citing any authority) that, as a matter of law, respondents were required to call at least one witness from each of the 23 operating companies to rebut petitioners' allegation of conspiracy (Pet. 3-4, 15). This argument is without merit, and would have resulted only in needless prolongation of the trial. AT&T was the hub of the alleged conspiracy. Defendants therefore called witnesses from AT&T and two of the operating companies, and Judge Weinfeld correctly found that their testimony, together with the other evidence in the case, negated any inference of conspiracy (Pet. 55a).

II

The Courts Below Correctly Found That There Was No Violation of Section 1 of the Sherman Act Under the Rule of Reason or the *Per Se* Doctrine.

Assuming *arguendo* the existence of a contract, combination, or conspiracy, the Courts below held that there was no violation of Section 1 of the Sherman Act under the *per se* doctrine or under the rule of reason (Pet. 56a-66a). Petitioners argue at some length that there was a violation of the rule of reason (Pet. 18-22). Almost as an afterthought, they argue that there was a *per se* violation of Section 1 of the Sherman Act (Pet. 23-24). Both arguments are without merit.

Petitioners' argument that there was a violation of Section 1 of the Sherman Act is based, not upon the facts found by the District Court, but upon the facts which were alleged by petitioners at the trial and which were expressly rejected by the District Court. For example, as noted above (*see* p. 12 *supra*), petitioners' argument that respondents failed to establish separate charges because of a desire to shield Centrex rates from state regulatory scrutiny (Pet. 19) was flatly rejected by the District Court (Pet. 49a). Similarly, petitioners' argument that, in the absence of the alleged agreement, the individual self-interest of the operating companies would have led them to establish separate Centrex station charges (Pet. 21-22, 23) is contrary to the express findings of the District Court (Pet. 54a-55a, 64a-65a).

The rule of reason, as the District Court noted (Pet. 62a), requires a detailed consideration of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago*

Board of Trade v. *United States*, 246 U.S. 231, 238 (1918). The District Court found, on the basis of a number of factors, that petitioners had failed to show that the alleged conspiracy had any substantial anticompetitive effect (Pet. 63a-65a).

The first factor relied upon by the District Court was the fact that the alleged agreement related only to the Centrex rate elements, and "did not restrict any operating company's ability to offer Centrex at whatever price it desired with whatever service features it desired, or even not to offer Centrex at all, as the tariffs actually filed demonstrate" (Pet. 63a). The fact that the alleged agreement did not have either the purpose or the effect of fixing the prices at which Centrex service was offered strongly supports the conclusion of the District Court that the rule of reason was not violated. *See, e.g., Jacobi* v. *Bache & Co.*, 377 F. Supp. 86, 95-96 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231, 1239-40 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *cf., e.g., Arizona* v. *Cook Paint & Varnish Co.*, 391 F. Supp. 962, 965-67 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977). For example, on January 1, 1966 the operating companies' rates for the first 50 stations of a Centrex subscriber varied from $6.30 to $16.50 (Pet. 59a n.84).*

The second factor relied upon by the District Court was the fact that the Centrex service rendered by each of the operating companies is regulated by state regulatory authorities, which are empowered to assure the fairness and reasonableness of the Centrex tariffs (Pet. 63a-64a). Again, this factor strongly supports the conclusion of the District

* Thus on January 1, 1966 the range of variation in the Centrex station charges (from $6.30 to $16.50, or $10.20) was more than six times as great as the maximum Federal excise tax on such charges ($1.65).

Court. *See, e.g., Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453 (1945); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506, 513 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972). Petitioners argue in this Court, as they did in the District Court, that the alleged conspiracy rendered it impossible for state regulatory authorities to discharge their responsibilities (Pet. 19, 21). The District Court correctly found that "[n]othing has been presented to support this claim" (Pet. 64a). On the contrary, the record before the District Court demonstrated active and effective supervision by state regulatory authorities (*see, e.g.*, E330-E334, E360-E367, E845-E873, E1455-E1461).

The third factor relied on by the District Court was that there was no competition among the respondents to be restrained by the alleged agreement, since each of the defendant operating companies, within its service area, is the only telephone company which is authorized under the applicable state laws to render Centrex service (Pet. 10a, 64a). This factor likewise lends extremely strong support to the conclusion of the District Court, because "[i]n the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act . . . ." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 500 (1940). *See, e.g., Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184, 1192-96 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).*

* Petitioners argue that the District Court "implicitly" held that there can never be a horizontal agreement between noncompetitors in violation of Section 1 of the Sherman Act (Pet. 23-24). On the contrary, the District Court expressly recognized that an agreement between noncompetitors may under some circumstances violate Section 1 of the Sherman Act (Pet. 31a-32a), but correctly held that the lack of competition is an important factor to be considered in determining whether there has been any restraint upon competition (Pet. 32a, 64a).

Judge Weinfeld further found that the alleged agreement had no anticompetitive purpose (Pet. 65a-66a). He found that the purpose of the original Centrex rate structure was to permit the use of the most economical means of rendering Centrex service, and that "the ultimate beneficiaries of any savings effected were the subscribers" (Pet. 66a). He also found that "the reason Centrex charges were not separated immediately after passage of the Act was not to attempt to shield excessive or discriminatory rates, but to try to prevent unnecessary expenditures in connection with the filing of new tariffs" (*ibid.*). Petitioners do not challenge these findings, which amply support the finding of the District Court that the rule of reason was not violated.

Since the Courts below correctly found that the alleged agreement did not violate the rule of reason, it followed *a fortiori*, for the same reasons, that it did not violate the *per se* doctrine (Pet. 56a-61a). Petitioners' argument that the alleged agreement was a price-fixing agreement (Pet. 23) founders on the admitted fact that the alleged agreement did not have the effect of fixing the price of Centrex service (Pet. 59a, 63a). Moreover, petitioners themselves admit that their attack on the alleged agreement is unsupported by any antitrust precedent (Pet. 18, 22), and, as the District Court noted (Pet. 61a), "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).

Despite petitioners' repeated efforts to force this case into the mold of an antitrust case, the fact remains that

the conspiracy alleged by petitioners has none of the hallmarks of a violation of Section 1 of the Sherman Act. Section 1 of the Sherman Act is directed at agreements restraining competition, but the respondents are regulated public utilities which do not (and legally cannot) compete in the rendition of Centrex service. Section 1 of the Sherman Act is concerned with the fixing of prices, but there was no fixing of prices in the present case. Section 1 of the Sherman Act is directed at agreements having an anticompetitive purpose or effect, but the District Court correctly found that respondents' actions were taken for good faith business reasons and had no anticompetitive purpose or effect.

III

The Courts Below Correctly Held That the Excise Tax Reduction Act of 1965 Contained No Mandate to Establish Separate Centrex Station Charges.

Petitioners argue in the alternative that the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), contained a mandate to the respondent operating companies to establish separate Centrex station charges "within a reasonable time" (Pet. 5, 24-25). After a careful examination of petitioners' argument, Judge Weinfeld held that the Excise Tax Reduction Act contained no such mandate (Pet. 67a-74a). Petitioners do not even suggest that this holding is in conflict with any holding of this Court or of any other court. Moreover, the holding was plainly correct.

As Judge Weinfeld noted (Pet. 68a), the language of the Excise Tax Reduction Act contains no mandate to establish a separate charge; it merely provides that the tax exemption for private communication service will not

apply "unless a separate charge is made for such service." 79 Stat. 146 (1965), 26 U.S.C. § 4252(d). Similarly, as Judge Weinfeld found (Pet. 68a-69a), the legislative history of the Act contains no mention of any such mandate.

Petitioners do not challenge these findings. Instead, petitioners argue that unless the Excise Tax Reduction Act is construed as containing an implied mandate to establish separate Centrex station charges, it would constitute an unconstitutional delegation of the taxing power of Congress (Pet. 24-25). The fallacy of this argument, as Judge Weinfeld observed (Pet. 71a), is that there has been no delegation of the Congressional power to tax. Congress has fully exercised its taxing power by determining that the tax exemption shall not apply "unless a separate charge is made". The fact that Congress has not dictated whether or not a separate charge shall be made in each instance does not mean that Congress has delegated its taxing power. As the District Court rightly held, "[t]here are numerous instances in the Internal Revenue Code where the application of a particular tax depends on the way a transaction is structured or upon choices made by the parties thereto" (Pet. 72a). It is firmly established that this does not constitute an unconstitutional delegation of the taxing power. *See, e.g., Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *cf., e.g., Phillips* v. *Commissioner*, 283 U.S. 589, 602 (1931). Accordingly, the Courts below correctly rejected petitioners' mandate theory.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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